

SPECIALTY TRANSPORTATION, INC.

CONTRACT NO. V689P-2563

VABCA-6211

**VA MEDICAL CENTER
WEST HAVEN, CONNECTICUT**

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OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

On March 10, 2000, the Board received the appeal of Specialty Transportation, Inc. (Specialty or Contractor) from a final decision, dated November 16, 1999, denying the Contractor's claim in the amount of \$30,713.57 arising out of Contract No. V689P-2563 entered into with the Department of Veterans Affairs (VA or Government) Medical Center, West Haven, Connecticut.

In our docketing letter we observed that the *Contract Disputes Act of 1978* (CDA), 41 U.S.C. § 601 *et. seq.*, provides in section 606 that an appeal to an agency board must be filed within ninety days from date of receipt of final decision and that it appeared that Specialty's appeal was untimely. Accordingly, *sua sponte*, we issued an ORDER TO SHOW CAUSE why the appeal should not be dismissed for lack of jurisdiction.

In its RESPONSE, the Appellant does not challenge that the appeal was not filed within 90 days of receipt of the decision. Rather, it argues the time period was not applicable because the "'final decision' dated November 16, 1999 did not

provide the information required by the CDA and the Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.211(4)(iii).” Specifically, the decision “failed to provide a ‘statement of the factual areas of disagreement and agreement’ as required” by the FAR and accordingly, the time period for filing an appeal had not begun to run. For its part, the Government in a REPLY TO APPELLANT’S RESPONSE maintains that the Contracting Officer’s final decision “complied with all of the Federal Acquisition Regulation (FAR) § 33.211 requirements” and as a result our Board is without jurisdiction to consider the matter.

The Record for purposes of our decision includes the joint Appeal File (R4, tabs 1-42) furnished in VABCA-6211 and 6212 (an appeal from a Termination for Default). The findings of fact for purposes of determining our jurisdiction are as follows.

FINDINGS OF FACT

On September 1, 1998, Specialty and the VA entered into Contract V689P-2563 (Contract) for the provision of “24 hour chair car service for non-emergency trips for the beneficiaries of the Department of Veterans Affairs Connecticut Health Care System.” (R4, tab 1) The Contract, which had a base year from December 1, 1998 to November 30, 1999 plus four one-year options, had a total value of \$2,197,120 based on the estimated number of trips for the full life of the Contract.

There were day and night base rates for pick up and delivery of patients within a twenty-five mile radius of the VA West Haven facility. For patients living farther away, there was, in addition to the base rates, a “price per mile over the 25 mile radius.” (R4, tab 1 at 3) The Contractor agreed to provide “30 minutes of free waiting time for each call” but was to be compensated at a rate of \$10.00 for each ¼ hour of waiting time beyond that. SECTION C, NUMBER OF PATIENTS,

provided that only one patient was to be transported on a trip unless specifically authorized otherwise by the VA. Where more than one patient was authorized to be transported concurrently, the section provided that:

reimbursement will be made only at the rates contained in the Schedule for transporting a single patient. Regardless of the number of patients transported concurrently on a single trip within city limits, the contractor will be reimbursed for only the base rate for one trip. Regardless of the number of patients transported concurrently beyond the city limits, the contractor will be reimbursed for the mileage rate for only one trip to the longest distance traveled with any one patient one [sic] that particular trip.

(R4, tab 1 at 8)

SECTION C, ORDERS, further provided in paragraph (c) that if the Contractor failed to furnish requested services within 30 minutes of a request for unscheduled service or within 15 minutes of scheduled pick-up, the VA could obtain services elsewhere and charge the Contractor for “any excess cost which might result therefrom.” In the event another source was not sought the VA could elect to bill the Contractor “at a rate of \$10.00 per ¼ hour” for the excess time that a patient had to wait for pick-up. (R4, tab 1 at 9)

Problems developed early in the Contract with the VA writing to Specialty on December 11, 1998, and January 7, 1999 concerning late or non-pick-up of patients. The VA reminded the Contractor of its right to charge the Contractor for late pick-up as noted above. (R4, tabs 4, 7) At meetings on February 4th and May 14th Specialty officials were again reminded that the VA was going to “charge Specialty for not meeting time requirements.” (R4, tabs 14, 20) Additional letters concerning late pick-up of dialysis patients or inaccurate logbook entries were sent to the Contractor on June 9th and August 3rd. (R4, tabs 22, 23)

A meeting was held between the parties on August 3rd which was followed up by a memorandum to Specialty in which the VA outlined a number of Contract performance problems. These problems included drivers who were “falsifying” arrival and departure times and “transporting of multiple riders without VA authorization and attempting to bill the VA as if each trip were individual.” The Contractor was informed that the practice was to stop immediately and that “[a]ll bills will be reviewed for unauthorized multiple transport.” (R4, tab 24)

Thereafter on October 11, 1999, Donna Grossman, President of Specialty wrote to Contracting Officer (CO) Conrad Guenzel concerning “billing discrepancies” the company was experiencing. (R4, tab 26) Ms. Grossman said that after “careful analysis of the contract” it was her understanding that the firm would only be reimbursed the base rate for a single trip “regardless of the number of patients transported concurrently on trips within city limits.” For trips “*beyond city limits*” where a number of patients are being transported concurrently, she acknowledged her firm was limited to a “*mil[e]age* rate for only one trip to the longest distance traveled.” But she maintained that the “[b]ase rate per patient shall not be altered regardless of the number of patients transported concurrently (outside city limits) . . . as per your contract.” She said she expected “full payment for all trips performed.”

On October 20th the Contracting Officer extended the Contract for a four-month period from December 1, 1999 through March 31, 2000. He also took issue with the Contractor’s October 11th letter stating that:

In accordance with Section C, Number of Patients. VA is going to *continue* to reimburse Specialty the base rate for one trip regardless of the number of patients transported concurrently on *a single trip regardless of*

whether the trip is within the city limits or beyond the city limits. (Emphasis added)

(R4, tab 27)

Specialty subsequently wrote to the Contracting Officer on November 9th noting that its billings from December 1998 through October 31, 1999 totaled \$408,964, of which the VA had not authorized \$30,713.57 for payment. (R4, tab 28) Following a meeting the next day with VA officials, a second letter was directed to the VA claiming that the Government's withholding of this amount "for services performed" constituted a "breach of contract." (R4, tab 29) The letter concluded that unless payment of the \$30,713.57 were made by November 20th, "we will have to cease services for the VA at midnight November 30, 1999 *as per our previous letter dated October 11, 1999.*" (Emphasis added)

Conrad Guenzel responded to the claim on November 16, 1999 with a "CONTRACTING OFFICER'S FINAL DECISION" which noted a dispute had developed with the Contractor concerning the "\$30,713.57 that was deducted from the contractor's invoices based on contract specifications and how services were provided." (R4, tab 32) After first reviewing the provisions of SECTION C, NUMBER OF PATIENTS, the Contracting Officer stated that if, pursuant to VA authorization, more than one patient were transported concurrently on a trip "reimbursement will be made only at rates contained in the Schedule for transporting a single patient." That is:

Regardless of the number of patients transported concurrently on a single trip within city limits, the contractor will be reimbursed for only the base rate for one trip. Regardless of the number of patients transported concurrently on a single trip beyond the city limits, the contractor will be reimbursed for the

mileage rate for only one trip to the longest distance traveled with any one patient on that particular trip.

The Contracting Officer next referred to paragraph c of SECTION C, ORDERS concerning late pickup of patients and the VA's right to "bill the contractor at a rate of \$10.00 per ¼ hour" for excessive delay by the Contractor. He also referred to subsection (d) as well which required the Contractor "to provide more than one chair car vehicle at a time, but no more than five chair car vehicles at one time." CO Guenzel then added:

VA personnel review all invoices that are submitted by Specialty and make all applicable deductions by comparing them with the driver log book which determines if the patients were transported together on the same trip, and with VA Form 119, which had noted on it, by VA Travel personnel, any deductions that need to be taken (e.g., patient had to wait beyond the required response time, VA ordered services from another source after Specialty refused trip th[r]ough not providing the required five vehicles, etc.). Therefore based on the contract specifications in Section C and the procedures used in determining what deductions are to be made from each invoice, Specialty Transportation's request to be paid the amount of \$30,713.57 is denied.

Mr. Guenzel concluded his letter by stating that this was "the final decision of the Contracting Officer" and by providing the Contractor with information as to its appeal rights as required by the FAR and the VA Acquisition Regulations (VAAR). On November 23rd, Ms. Grossman acknowledged receipt of the "final decision denying the \$30,713.57 due Specialty" and informed the VA that it would be ceasing services for the VA on November 30th. (R4, tab 34)

On November 29th, the VA issued a SHOW CAUSE NOTICE followed by a TERMINATION FOR CAUSE on December 16, 1999. (R4, tabs 34, 38) Appellant

deposited its Notices of Appeal of the November 16th final decision and the December 16th termination into the United States Mail on March 9, 2000. The appeal of the November 16th final decision, which was filed at least 107 days after receipt, was docketed as VABCA-6211. The appeal of the termination, which was filed within the 90 day prescribed statutory period, was docketed as VABCA-6212.

DISCUSSION

The *Contract Disputes Act of 1978*, 41 U.S.C. § 601 et seq., provides in § 606 that:

Within ninety days from the date of receipt of a contracting officer's final decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

The time limitation on the filing of an appeal, as a statutory waiver of sovereign immunity, must be strictly construed. Thus, the Board is without discretion to assume jurisdiction over an appeal not filed within ninety days. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); *Olympus Corporation*, VABCA No. 3550, 92-2 BCA ¶ 24,856; *Surgical Appliance Industries, Inc.*, VABCA No. 3674, 93-1 BCA ¶ 25,364.

Appellant does not contest that the appeal of the November 16th final decision was filed after the expiration of 90 days of receiving it. Rather, it maintains that the "time period for filing an appeal only begins to run once the Contracting Officer issues a final decision that complies with the requirement of the CDA and FAR." In 41 U.S.C. § 605, **Decision By Contracting Officer**,

Subsection (a) provides, in pertinent part that:

The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but if made, shall not be binding in any subsequent proceeding.

The applicable FAR provision implementing this statutory provision, § 33.211 (a), CONTRACTING OFFICER'S DECISION provides, in pertinent part, that a contracting officer shall:

- (4) Prepare a written decision that shall include a –
 - (i) Description of the claim or dispute;
 - (ii) Reference to the pertinent contract terms;
 - (iii) Statement of the factual areas of agreement and disagreement;
 - (iv) Statement of the contracting officer's decision, with supporting rationale
 - (v) [Notification of Appeal rights]

That provision is further supplemented by VA Acquisition Regulation (VAAR) §833.211 which provides in subsection (b):

The decision must be identified as a final decision, be in writing, and include a statement of facts in sufficient detail to enable the contractor to fully understand the decision and the basis on which it was made. It will normally be in form of a statement of the claim or other description of the dispute with necessary references to the pertinent contract provisions. It will set forth those facts relevant to the dispute with which the contractor and the contracting officer are in agreement and as clearly as possible, the area of disagreement.

Relying on § 33.211 (a) (4) (iii), Appellant argues that the "VA never provided information to Specialty Transportation for it to determine whether it agreed or disagreed with the VA's decision to withhold payment." Appellant

points out that the “decision does not identify the specific trips that are the basis for the withholding, or the amount of withholding attributable to *each* trip.” (Emphasis added). Specialty was thus “forced to dispute the entire amount” when it was “conceivable” that some of it might not be disputed. The Government in its REPLY TO APPELLANT’S RESPONSE argues that the November 16th final decision “complied with all of the Federal Acquisition Regulation (FAR) § 33.211 requirements” and as a consequence the “Board lacks jurisdiction of VABCA No. 6211.”

Questions concerning whether a “final decision” meets the requirements of the Contract Disputes Act usually arise in the context of whether or not a Contractor has been fully informed of its appeal rights in the prescribed manner. As the court held in *Pathman Construction Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987):

A contracting officer’s final decision that does not give the contractor adequate notice of its appeal rights is defective and therefore does not trigger the running of the limitations period.

Accord: Select Contracting, Inc., VABCA No. 4541, 95-2 BCA ¶ 27,830 (VA failure to transmit final decision by certified mail as required by VAAR renders final decision defective; Contractor may elect to appeal such defective final decision.)

Reported appeals of Contractor claims alleging procedurally defective final decisions due to non-compliance with FAR 33.211(a) (4) requirements *other than* defective appeal right information appear to be rare. *Industrial Data Link Corporation*, ASBCA No. 49,348, 98-1 BCA ¶ 29,634; *Motorola, Inc.*, ASBCA No. 46785, 95-2 BCA ¶27,645 ; *RMTC Systems, Inc.*, ASBCA No. 46496, 94-2 BCA

¶ 26,743; and *World Computer Systems, Inc.*, DOTCAB No. 2802, 95-1 BCA ¶ 27,339.

The precise issue before us in this appeal presents a case of first impression for the Board. Looking at the record before us, however, the dispute and the positions of the parties appear well defined to us. The principal point of contention is whether the base rate for more than one person is payable for concurrent transportation of veterans beyond a 25-mile radius of West Haven. The Contractor argued that it was and the VA maintained that it was not and further that it was reviewing “all bills for unauthorized multiple transport.” Both parties point to the same contract provision to support their respective positions. There is no middle ground here. Either reimbursement is limited by the Contract as the VA maintains or it is not.

Applying its interpretation of the Contract provision in question, the Contracting Officer informed Specialty in his final decision that the VA had compared the invoices with the driver log book and declined to pay more than one base rate where the log book disclosed concurrent transportation of veterans. The Appellant, who had prepared both the invoices and the driver log book and who objected to the nonpayment of *any* multiple base rate invoice for concurrent travel, cannot be said to be unaware of the “factual areas of agreement and disagreement.”

Similarly, we know of no disagreement concerning the Government’s right under the Contract to charge the Contractor for tardy pick-up of patients. Whatever portion of the \$30,713.57 that is not attributable to the denial of multiple base rate billings, is presumably the result of charges for tardy pickup of veteran patients. Inasmuch as the assessment of damages is calculated by comparing schedule pick-up times with actual times recorded in the driver log book by Specialty’s own employees we find that the Government has adequately fulfilled

its responsibilities as required by the *Contract Disputes Act* and applicable regulations to “enable the contractor to fully understand the decision and the basis on which it was made.”

Thus we conclude that a proper final decision was issued and that we lack jurisdiction to consider it because it was not filed within 90 days of receipt. We note however, that the Contractor may still appeal to the Court of Federal Claims and note further that the *CDA* provides in 41 U.S.C. § 609 (d) that:

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of the parties or witness or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

DECISION

For the foregoing reasons, the Appeal in VABCA-6211 is DISMISSED for lack of jurisdiction pursuant to Board Rule 5.

DATE: **June 7, 2000**

GUY H. MCMICHAEL III
Chief Administrative Judge
Panel Chairman

We Concur:

JAMES K. ROBINSON
Administrative Judge

WILLIAM E. THOMAS, JR.
Administrative Judge